

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

November 6, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0825-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ERIC L. HANSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jackson County: ROBERT W. RADCLIFFE, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Deininger, J.

PER CURIAM. Eric L. Hansen appeals a judgment of conviction for armed burglaries and a related offense, and the denial of his motion for postconviction relief. The issue is whether Hansen received ineffective assistance of counsel due to counsel's failure to move to suppress Hansen's confession. We conclude that Hansen failed to demonstrate: (1) the legal merit of a suppression

motion; and thus, (2) the resulting prejudice for failing to pursue suppression. Therefore, we affirm.

Hansen and a friend were apprehended for a multitude of armed burglaries, thefts and related offenses. When Hansen was arrested, unbeknownst to him, his father drove to the jail but was denied permission to see him or to leave him a note. While in custody, Hansen confessed. Hansen admitted that he had been informed of and understood that he had a right to counsel. Hansen did not ask to see his parents, and he did not know that his father had attempted to see him. Hansen admitted that he confessed to these crimes because: (1) his cohort had already confessed; and (2) he “wanted it over as quick as possible so I told them everything.”¹

By postconviction motion, Hansen moved to withdraw his guilty pleas because his counsel was allegedly ineffective for failing to move to suppress his confession. After a *Machner* hearing, the trial court denied his postconviction motion. See *State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908-09 (Ct. App. 1979). Hansen appeals.

To establish an ineffective assistance claim, a defendant must show that: (1) counsel’s performance was deficient; and (2) that deficient performance prejudiced the defense. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Hansen must be able to demonstrate, among other things, that had counsel moved

¹ Pursuant to a plea agreement, Hansen pled guilty to two counts of armed burglary, contrary to § 943.10(2)(a), STATS., and to taking and operating a motor vehicle without the owner’s consent, contrary to § 943.23(2), STATS. The trial court imposed ten and five-year consecutive sentences on one of the burglary counts and the operating without consent count, and withheld sentence and imposed a fifteen-year consecutive term of probation on the remaining burglary count.

to suppress his confession, it was reasonably probable that the trial court would have done so. *See id.* at 694. After the *Machner* hearing, the trial court concluded precisely the opposite—that there was not “a sufficient basis ... to now suppress those statements ... [or to have done so] if that had been raised by counsel ... prior to the plea.” We agree.

At the *Machner* hearing, trial counsel testified that he had discussed the confession with Hansen, and that Hansen never claimed that he was coerced into talking to the police. Trial counsel said that he did not move to suppress Hansen’s confession because he did not believe that such a motion, in the context of these facts, had merit. Hansen testified that he sought postconviction relief because: (1) he was angry that he was not allowed to use the telephone;² and (2) he sought a reduced sentence.

Hansen’s father testified that he thought about calling a lawyer, and went to the jail to ask his son if he wanted a lawyer, but “they wouldn’t let me ask him.” When Hansen’s father was denied admittance to the jail, he did not follow through and obtain a lawyer for his son. In fact, Hansen’s father testified that, when he finally was allowed to see his son, he refused assistance from his father because “[he] got [him]self into this ... [and he]’ll get [him]self out of it.”

We review the denial of an ineffective assistance claim as a mixed question of fact and law. *See Strickland*, 466 U.S. at 698. We will not reverse the trial court’s factual findings unless they are clearly erroneous, but, we review the two-pronged determination of trial counsel’s performance as a question of law.

² Hansen did not claim that he wanted to use the telephone to contact a lawyer, nor did he invoke his right to counsel.

See State v. Johnson, 153 Wis.2d 121, 127-28, 449 N.W.2d 845, 848 (1990). Because both deficient performance and resulting prejudice must be shown, we need not analyze whether trial counsel's performance was deficient, if the defendant has not met his affirmative burden of proving the resulting prejudice. *See id.* at 128-29, 449 N.W.2d at 848.

We agree with the trial court that Hansen offers nothing to substantiate his ineffective assistance claim. First, when Hansen confessed he was unaware that his father had been denied admittance to see him.³ Second, Hansen did not ask his father to obtain counsel for him, in fact Hansen told his father that "he could handle it all right [himself]." Third, the constitutional rights to counsel and to remain silent are personal to the defendant. *See State v. Hanson*, 136 Wis.2d 195, 213, 401 N.W.2d 771, 778 (1987). These rights cannot be invoked by defendant's family, friends, or counsel; they are personal rights and cannot be exercised by anyone other than the defendant. *See id.*

We conclude that Hansen has failed to demonstrate that his trial counsel's failure to move for suppression of his confession was prejudicial. Even if it is true that his father would have obtained counsel for Hansen had his father not been denied admittance to the jail, this contention is legally insufficient under *Hanson*. Consequently, Hansen has not shown that it was reasonably probable that the trial court would have suppressed his confession.

³ "Facts about which the defendant has no knowledge can hardly exert any degree of coercion on him." *State v. Hanson*, 136 Wis.2d 195, 215, 401 N.W.2d 771, 779 (1987).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

